

ORDER NO. 1701

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Robert G. Taub, Vice Chairman;
Mark Acton;
Tony Hammond; and
Nanci E. Langley

Competitive Product Prices
International Business Reply Service Competitive
Contract 3 (MC2011-21)
Negotiated Service Agreements

Docket No. CP2013-58

ORDER APPROVING NEW INTERNATIONAL BUSINESS REPLY SERVICE
COMPETITIVE CONTRACT 3 AGREEMENT

(Issued April 16, 2013)

I. INTRODUCTION

The Postal Service seeks to include a new International Business Reply Service (IBRS) contract (Agreement) within the IBRS Competitive Contract 3 product.¹ For the reasons discussed below, the Commission approves the addition of the Agreement to the IBRS Competitive Contract 3 product.

¹ Notice of the United States Postal Service Filing of a Functionally Equivalent International Business Reply Service Competitive Contract 3 Negotiated Service Agreement, April 4, 2013 (Notice). The Notice was filed pursuant to 39 C.F.R. § 3015.5.

II. BACKGROUND

IBRS competitive contracts provide businesses that sell lightweight articles to foreign consumers with an opportunity to offer consumers a way to return those articles to the United States for recycling, refurbishing, repairing, or other value-added processing. *Id.* at 5. The Commission approved the addition of the IBRS Competitive Contract 3 product to the Mail Classification Schedule (MCS) in February 2011 and designated the agreement filed in Docket Nos. MC2011-21 and CP2011-59 as the baseline agreement for purposes of establishing functional equivalence.²

The Notice includes redacted versions of the Agreement (Attachment 1); the certified statement required under 39 C.F.R. § 3015.5(c)(2) (Attachment 2); Governors' Decision No. 08-24 (Attachment 3); and an application for non-public treatment of materials filed under seal (Attachment 4). Notice at 2. The material filed under seal includes unredacted versions of Attachments 1 through 3. *Id.*

The Postal Service identifies the Agreement as the successor to the agreement included in the IBRS Competitive Contract 3 product in Docket No. CP2012-17. *Id.* at 3. The Agreement concerns customized mail service for IBRS from Canada. The stated effective date is April 24, 2013. *Id.* The Agreement expires 1 year after its effective date unless termination occurs earlier. *Id.* at 4.

On April 5, 2013, the Commission issued an order establishing a docket for consideration of the Postal Service's request, appointing a Public Representative, and providing interested persons with an opportunity to comment.³

III. POSTAL SERVICE'S POSITION

Functional equivalence. The Postal Service asserts that the Agreement is functionally equivalent to the baseline agreement (Docket No. CP2011-59) because it

² See Order No. 684, Docket Nos. MC2011-21 and CP2011-59, Order Approving International Business Reply Service Competitive Contract 3 Negotiated Service Agreement, February 28, 2011.

³ Order No. 1691, Notice and Order Concerning an Additional Business Reply Service Competitive Contract 3 Negotiated Service Agreement, April 5, 2013.

shares similar cost and market characteristics. Notice at 4. The Postal Service states that the Agreement complies with Governors' Decision No. 08-24, which established a pricing formula and classification to ensure that each IBRS agreement complies with 39 U.S.C. § 3633 and related regulations, and asserts that the costs of each IBRS contract therefore conform to a common description. *Id.* The Postal Service also states that the IBRS language proposed for the MCS requires that each IBRS agreement must cover its attributable costs. *Id.*

The Postal Service asserts that the functional terms of the contract and benefits of the Agreement are the same as those of the baseline agreement. *Id.* It states that prices offered under the Agreement may differ from other IBRS 3 contracts due to differences in volumes, postage commitments, and pricing at the time of the Agreement's execution, but asserts that these differences do not alter the functional equivalency of the Agreement with the baseline agreement. *Id.* at 5. In addition, the Postal Service identifies what it characterizes as minor differences between the Agreement and the baseline agreement. *Id.* These include a revision to Article 15, which adds a phrase addressing the possibility that Agreement-related information may be filed in other Commission dockets, and the inclusion of a new Article 30 concerning intellectual property, co-branding, and licensing. *Id.* at 5-6. The Postal Service asserts that these differences do not affect the fundamental service being offered or the fundamental structure of the Agreement. *Id.* at 6. It therefore claims that nothing detracts from the conclusion that the Agreement is functionally equivalent to the baseline agreement. *Id.*

IV. COMMENTS

The Public Representative filed comments supporting the addition of the Agreement to the IBRS Competitive Contract 3 grouping.⁴ No other comments were received.

The Public Representative concludes, based on his review of the Agreement and supporting materials filed under seal, that the Agreement is functionally equivalent to the baseline agreement. PR Comments at 2. He characterizes the Agreement as “very favorable” to the partner, but concludes that the Postal Service is “very likely” to make a substantial contribution toward the recovery of institutional costs and concludes that the Agreement satisfies the requirements of section 3633. *Id.* at 2, 3.

V. COMMISSION ANALYSIS

The Commission’s responsibilities in this case are to determine whether the Agreement: (1) is functionally equivalent to the IBRS 3 baseline contract; and (2) satisfies the requirements of 39 U.S.C. § 3633 and applicable Commission rules (39 C.F.R. §§ 3015.5 and 3015.7).

Functional equivalence. The Commission concludes that the Agreement shares similar cost and market characteristics with the baseline agreement. The Commission has considered the nature and impact of the two differences between the Agreement and the baseline agreement (revised Article 15 and new Article 30). It determines that these differences are minor and do not affect the fundamental service being offered or the fundamental structure of the contract. The Agreement is included within the IBRS Competitive Contract 3 product.

Section 3633 considerations. The Commission reviews competitive product rates to ensure that they meet the requirements of 39 U.S.C. § 3633 and 39 C.F.R. §§ 3015.5 and 3015.7. The Commission has reviewed the financial analyses provided

⁴ Public Representative Comments, April 15, 2013 (PR Comments). See also Public Representative Motion for Leave to File Reply Comments One Business Day Late, April 15, 2013 (Motion). The Commission grants the Motion.

under seal and the Public Representative's Comments addressing the consistency of the Agreement with applicable requirements. Based on the information provided, the Commission finds that the Agreement should not lead to the subsidization of competitive products by market dominant products, satisfying 39 U.S.C. § 3633(a)(1); should cover its attributable costs, satisfying 39 U.S.C. § 3633(a)(2); and should have a positive effect on competitive products' contribution to institutional costs, satisfying 39 U.S.C. § 3633(a)(3).

Other considerations. The Postal Service represents that the Agreement will become effective April 24, 2013 and will terminate 1 calendar year after the effective date, unless terminated sooner. *Id.* at 3, 4; *see also id.* Attachment A at 4. The Postal Service shall promptly notify the Commission if the effective date of the Agreement differs from the stated effective date. The Postal Service shall also promptly notify the Commission if the Agreement terminates earlier than scheduled.

The Agreement, like previous IBRS competitive contracts, includes a contingency clause in Article 8, which allows the Postal Service to change rates based on cost increases without entering into a new agreement. *Id.* at 3. Article 27 addresses contingency prices under early termination and other circumstances. *Id.* at 7-8. The Commission reviewed these types of clauses in Docket Nos. MC2009-14 and CP2009-20 and concluded that if prices change under the terms of these contingencies, the Postal Service must file the changed rates under 39 C.F.R. § 3015.5 and provide at least 15 days' notice. However, the Commission also stated that it did not anticipate the need for further action unless the changed rates raise new issues.⁵ The Commission further determined that its conclusions with respect to the agreement in Docket Nos. MC2009-14 and CP2009-20 would apply to other agreements with similar provisions permitting contingency prices. *Id.* at 11. As the Agreement includes similar contingencies, the Postal Service shall file notice with the Commission of rate changes

⁵ See Docket Nos. MC2009-14 and CP2009-20, Order No. 178, Order Concerning International Business Reply Service Contract 1 Negotiated Service Agreement, February 5, 2009, at 9-11.

occurring as the result of a contractual contingency at least 15 days before the effective date of such changes.

Conclusion. The Commission concludes that the Agreement is appropriately added to the existing IBRS Competitive Contract 3 product.

VI. ORDERING PARAGRAPHS

It is ordered:

1. The Agreement filed in Docket No. CP2013-58 is included within the International Business Reply Service Competitive Contract 3 product.
2. The Postal Service shall notify the Commission if the effective date of the Agreement differs from the stated effective date of April 24, 2013.
3. The Postal Service shall notify the Commission if the Agreement terminates earlier than scheduled.
4. The Postal Service shall file any modifications of prices in the Agreement with the Commission as described in this Order.

By the Commission.

Ruth Ann Abrams
Acting Secretary